## Pengkalen Holdings Bhd v Dato' V Sivaparanjothi

HIGH COURT (KUALA LUMPUR) — PETITION NO 17–8 OF 1997
NIK HASHIM JC
25 JULY 1997

***Civil Procedure*** *— Costs — Taxation — Bill of costs not challenged within the time period stipulated — Whether special circumstances shown to warrant bills to be taxed — Whether, on the facts, petitioner was estopped from alleging that the bill was excessive — Legal Profession Act 1976 s 128(1)*

***Civil Procedure*** *— Pleadings — Striking out — Application to strike out petition for taxation — Whether petition discloses any reasonable cause of action, frivolous and vexatious and was abuse of the process of the court — Rules of the High Court 1980 O 18 r 19*

The respondent was the sole proprietor of a legal firm which was appointed to represent the petitioner in an action in the High Court. The petitioner agreed to make payment to the legal firm in respect of the legal fees or any other related expenses which may be incurred in relation thereto. The petitioner made two payments to the respondent and was issued two official receipts. The first receipt was for 'part payment towards irrefundable professional fees and disbursements', while the second receipt was for 'full settlement towards irrefundable professional fees and disbursements'. Subsequently, there was a change of the board of directors and managers following a takeover of the petitioner. The petitioner's new management claimed that the bill of costs was very high and excessive for the work done. The petitioner filed a petition for taxation eight months after receipt of the bill of costs. Subsequently, the respondent filed an application under O 18 r 19 of the Rules of the High Court 1980 ('the RHC') to strike out the petition on the ground that the petition discloses no reasonable cause of action, frivolous and vexatious and was an abuse of the process of the court.

**Held**, dismissing the petition and allowing the respondent's application to strike out the petition:

Striking out pleadings under O 18 r 19 of the RHC is a discretionary power to be exercised sparingly, according to the justice of the case. The summary process under this rule can only be adopted when a claim on the face of it is obviously unsustainable or is bound to fail. The court is entitled to scrutinize the evidence in order to decide whether the petition is unsustainable or bound to fail. If, in light of the history of the case, the case is vexatious, the case can be struck out and the action dismissed (see p 221H–I); *Muniandy s/o Subrayan & Ors v Chairman & Board Members of Koperasi Menara Maju Bhd* [1997] 1 MLJ 557, *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113, *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36, *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1, *Re Vernazza* [1959] 2 All ER 200 and *Jamir Hassan v Kang Min* [1992] 2 MLJ 46 followed.

As the bill was submitted to the petitioner more than six months before the petition, the petitioner has to show, under s 128(1) of the Legal Profession Act 1976, special circumstances to the satisfaction of the court to tax the respondent's bill of costs. In this case, there was no conflict of material evidence or of affidavits on material points and therefore, there was no triable issue fit to be tried by the High Court. Further, the directors' resolutions appointing the legal firm had agreed to pay all the legal fees and expenses. The terms of the two receipts issued to the petitioner were clear and unequivocal in that the professional fees and disbursements were irrefundable. They were agreed to by the then executive chairman that the sum be treated as a gross lump sum fee. This being so, the petitioner would be estopped from alleging that the bill was excessive. Moreover, to dispute the bill eight months after the unconditional payment was made for the services rendered by the respondent was unconscionable. Taxation of the bill would cause the respondent irreparable financial prejudice and detriment. The petition was therefore scandalous, frivolous and an abuse of the process of the court as it disclosed no cause of action whatsoever (see pp 222F–I and 223B–E); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 followed.

**[Bahasa Malaysia summary**

Penentang adalah tuan punya tunggal firma undang-undang yang dilantik untuk mewakili pempetisyen dalam suatu tindakan di Mahkamah Tinggi. Pempetisyen bersetuju membuat bayaran kepada firma undang-undang berkenaan dengan yuran undang-undang atau mana-mana perbelanjaan yang berkaitan yang mungkin ditanggung berhubung dengan tindakan itu. Pempetisyen telah membuat dua bayaran kepada penentang dan dikeluarkan dua resit rasmi. Resit pertama adalah untuk 'sebahagian bayaran terhadap yuran dan pembayaran profesional yang tidak boleh dikembalikan', manakala resit kedua adalah untuk 'penjelasan penuh terhadap yuran dan pembayaran profesional yang tidak boleh dikembalikan'. Berikutnya, terdapat pertukaran dalam lembaga pengarah dan pengurus susulan daripada pengambilalihan pempetisyen. Pengurusan pempetisyen yang baru menuntut bahawa bil kos adalah amat tinggi dan melampaui untuk jumlah kerja yang dilaksanakan. Pempetisyen memfailkan petisyen untuk pencukaian lapan bulan selepas menerima bil kos. Berikutnya, penentang memfailkan suatu permohonan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk membatalkan petisyen atas alasan bahawa petisyen tidak mendedahkan kausa tindakan yang munasabah, adalah remeh dan menyusahkan dan merupakan suatu penyalahgunaan proses mahkamah.

**Diputuskan,** menolak petisyen dan membenarkan permohonan penentang untuk membatalkan petisyen:

Pembatalan pliding di bawah A 18 k 19 KMT adalah kuasa berdasarkan budi bicara untuk dilaksanakan secara berjaga-jaga, menurut keadilan kes. Proses terus di bawah kaedah ini hanya boleh

diterima-pakai apabila suatu tuntutan jelas tidak boleh dikekalkan atau pasti akan gagal. Mahkamah berhak meneliti keterangan bagi memutuskan sama ada petisyen tidak boleh kekal atau pasti gagal. Memandangkan sejarah kes, andainya kes adalah menyusahkan, kes boleh dibatalkan dan tindakan ditolak (lihat ms 221H–I); *Muniandy s/o Subrayan & Ors v Chairman & Board Members of Koperasi Menara Maju Bhd* [1997] 1 MLJ 557, *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113, *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36, *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1, *Re Vernazza* [1959] 2 All ER 200 dan *Jamir Hassan v Kang Min* [1992] 2 MLJ 46 diikut.

Oleh kerana bil diserahkan kepada pempetisyen lebih daripada enam bulan sebelum petisyen, pempetisyen harus menunjukkan keadaan istimewa di bawah s 128(1) Akta Profesyen Undang-Undang 1976 demi memuaskan mahkamah supaya mengenakan cukai ke atas bil kos penentang. Dalam kes ini, tiada percanggahan atas keterangan material atau afidavit atas hujah material dan maka, tiada isu yang boleh dibicarakan oleh Mahkamah Tinggi. Seterusnya, resolusi pengarah yang melantik firma undang-undang telah bersetuju membayar segala yuran dan perbelanjaan undang-undang. Terma dua resit yang dikeluarkan kepada pempetisyen adalah jelas dalam ertikata yuran dan pembayaran profesional tidak boleh dikembalikan. Ini disetujui oleh ketua pengerusi pada masa itu bahawa jumlah tersebut dianggap sebagai yuran sekaligus kasar. Oleh yang demikian, pempetisyen akan diestop daripada mengatakan bahawa bil adalah melampau. Tambahan pula, untuk mempertikaikan bil lapan bulan selepas bayaran tanpa syarat dibuat untuk perkhidmatan yang dijalankan oleh penentang adalah tidak berpatutan. Pencukaian bil akan memudaratkan penentang dari segi kewangan dan penjejasan. Dengan itu, petisyen tersebut adalah mengaibkan, remeh dan merupakan suatu penyalahgunaan proses mahkamah kerana ia tidak mendedahkan apa-apa kausa tindakan sama sekali (lihat ms 222F–I dan 223B–E); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 diikut.]

**Notes**

For cases on taxation, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1031–1076.

For cases on strking out, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2649–2676 and 3171.

**Cases referred to**

*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36 (folld)

*Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 (folld)

*Jamir Hassan v Kang Min* [1992] 2 MLJ 46 (folld)

*Muniandy s/o Subrayan & Ors v Chairman & Board Members of Koperasi Menara Maju Bhd* [1997] 1 MLJ 557 (folld)

*Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 (folld)
*Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 (folld)
*Vernazza, Re* [1959] 2 All ER 200 (folld)

**Legislation referred to**

Legal Profession Act 1976 s 128(1)
Rules of the High Court 1980 O 18 r 19

*Muzafar bin Munzir* (*Azim Ong & Krishnan*) for the petitioner.
*VK Lingam* (*W Satchithanandhan, R Thayalan* and *RK Mogan* with him) (*VK Lingam & Co*) for the respondent.

**Nik Hashim JC:** The respondent, Dato' V Sivaparanjothi, filed an application by way of summons in chambers under O 18 r 19 of the Rules of the High Court 1980 ('the RHC') to strike out the petition of the petitioner, Pengkalen Holdings Bhd that the solicitor's bill of costs No VSP/127/96 of the respondent be taxed pursuant to s 128(1) of the Legal Profession Act 1976 ('the Act'). The grounds of the application are that the petition discloses no reasonable cause of action (r 19(1)(a)), scandalous, frivolous and vexatious (r 19(1)(b)) and abuse of the process of the court (r 19(1)(d)).

The respondent is the sole proprietor of the legal firm Messrs V Siva & Partners. The firm was appointed on 17 May 1996 to represent the petitioner in the takeover bid by Malayan United Industries Bhd ('MUIB') and in an action in the High Court of Malaya at Kuala Lumpur (Commercial Division) Civil Suit No D2–22–337–96 between Loyal Design Sdn Bhd as plaintiff and the petitioner and six of its directors as defendants. The petitioner claimed that the bill of costs of RM960,569.50 comprising RM850,000 for professional fees, RM42,500 for 5% service tax and RM68,069.50 for actual and expected disbursements, was very high and excessive. Hence the petition for taxation.

In an action under O 18 r 19 of the RHC, it is important to take note of the often-quoted principles governing their application. Striking out pleadings under O 18 r 19 is a discretionary power to be exercised according to the justice of the case (*Muniandy s/o Subrayan & Ors v Chairman & Board Members of Koperasi Menara Maju Bhd* [1997] 1 MLJ 557). However, the power must be sparingly exercised (*Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113). The summary process under this rule can only be adopted when a claim on the face of it is obviously unsustainable (*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36) or bound to fail (*Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1).

In considering whether any proceedings are vexatious, the court is entitled to look at affidavits as to the history of the case, and if in the light of the history the action is vexatious, the case can be struck out and the action dismissed (*Re Vernazza* [1959] 2 All ER 200; *Jamir Hassan v Kang Min* [1992] 2 MLJ 46).

Similarly, I would apply the above mentioned principles to the present case. Since the application to strike out the application is not limited solely on the ground under para (a) of r 19(1), but also on paras (b) and (d) thereof, the court is therefore entitled to scrutinize the evidence in order to decide whether the petition is obviously unsustainable or bound to fail. Accordingly, the court will do likewise in this case. Thus, this ruling answers the petitioner's counsel earlier objection over the reference of JB Tan's affidavit by the respondent's counsel in support of his argument to strike out the petition.

It is pertinent to note that the petitioner had appointed the respondent as solicitor to act for them and by the directors' resolutions dated 23 May 1996, they have agreed to make payment to Messrs V Siva & Partners in respect of the legal fees or any other related expenses which may be incurred in relation thereto. Subsequent to the appointment, the respondent retained four advocates and solicitors to assist him. The first part of the bill of RM500,000 was paid on 27 May 1996, while the balance of RM460,569.50 was paid on 26 July 1996 being the full settlement of the bill. Two official receipts for the payments thereof were issued by the respondent. The first receipt was for 'being part payment towards irrefundable fees professional and disbursements', while the second one stated for 'being full settlement towards irrefundable professional fees and disbursements vide bill No VSP/127/96'. On 16 August 1996, there was a change of board of directors and managers following the takeover of the petitioner by MUIB. The petitioner's new management are of the opinion that the bill was excessive for the work done. As the bill was submitted to the petitioner more than six months but not exceeding one year, the petitioner, under s 128(1) of the Act, has to show special circumstances to the satisfaction of this court to order the respondent's bill of costs to be taxed.

Section 128(1) states:

> After the expiration of six months from the delivery of a bill of costs, or after payment of the bill of costs, no order shall be made for taxation of a solicitor's bill of costs, except upon notice to the advocates and solicitors and under special circumstances to be proved to the satisfaction of the court.

After perusing the petition and the affidavits, I hold that there is no conflict of material evidence or of affidavits on material points in this case. There is no triable issue fit to be tried by the High Court. The resolutions appointing Messrs V Siva & Partners had agreed to pay all the legal fees and expenses. Full payments and settlement of the bill were made without protest or qualification by the petitioner. The terms of the two receipts issued to the petitioner are clear and unequivocal in that the professional fees and disbursements are irrefundable, and indeed they are agreed to by the then executive chairman JB Tan. According to JB Tan, the sum RM960,569.50 was to be treated as a gross lump sum fee. That being so, the petitioner is estopped from alleging that the bill is excessive (*Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331). Therefore, the question of the bill being excessive does no

more arise. Apart from saying that the petitioner's former management had failed to make careful evaluation before the bill was paid, there was no allegation made by the petitioner of whatever misfeasance or misconduct by the former directors in approving the bill. Neither is there any opinion from experts to say that the bill is prima facie exorbitant. The petitioner must show that there is reasonable cause of action, which means under s 128(1) of the Act, it must show special circumstances to the satisfaction of the court. The explanation for the delay in filing the petition and the allegation that the bill was excessive, as stated at para 9(a)–(e) of the petition as special circumstances, are obviously unsustainable to support the petition, and with the presence of the undisputed evidence before the court that the bill paid was irrefundable and agreed to by the petitioner's previous board of directors, I am of the view that the petition is bound to fail. To dispute the bill eight months later after the unconditional payment was made in full for the services rendered by the respondent and four other lawyers, to my mind, is unconscionable. With respect, I agree with the submission of counsel for the respondent that taxation of the bill would cause the respondent irreparable financial prejudice and detriment. I would sum up to say that this is a plain case of an able and willing client to pay for the work done by a solicitor.

In the event, I hold that the petition is scandalous, frivolous and an abuse of the process of the court as the petition discloses no reasonable cause of action whatsoever. In the circumstances, I would allow the respondent's application to strike out the petition and accordingly, I dismiss the petition with costs to be taxed.

*Petition dismissed and application to strike out petition allowed.*

Reported by David Lai